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No. 86-208

In the Supreme Court of the United States

October Term, 1986

JACK MOLDOVAN and JACK DRAPER,
as Trustees for the
TRI-STATE UFCW AND EMPLOYERS
BENEFIT FUND,
Petitioners,

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

Petitioners Jack Moldovan and Jack Draper ("Trustees"), as Trustees for the Tri-State UFCW and Employers Benefit Fund ("Fund"), seek to collect contributions allegedly owed to the Fund by Respondent The Great Atlantic & Pacific Tea Company, Inc. ("A&P")[1] on behalf of bargaining unit employees in A&P's Altoona, Pennsylvania Division.[2]

Altoona Division bargaining unit employees were represented by Local 590 of the United Food and Commercial Workers Union, AFL-CIO-CLC ("Union"). The most recent collective bargaining agreement between A&P and the Union for such employees became effective on October 2, 1977 and expired on October 23, 1980 ("1977-1980 Contract"). On September 23, 1982, A&P closed its Altoona Division. At the time of the Altoona Division closing, no collective bargaining agreement was in effect.

A&P thought that a successor agreement to the 1977-1980 Contract had been agreed to when A&P and the Union executed a handwritten Memorandum of Agreement on October 24, 1980, which reflected changes from the 1977-1980 Contract and which was to be incorporated into the terms of a new collective bargaining agreement.

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[1] Pursuant to Rule 28.1, A&P has no parent company, subsidiaries (other than wholly-owned subsidiaries), or affiliates. Tengelmann-Warenhandelsgellschaff, a partnership organized under the laws of West Germany and controlled by Mr. Erivan Haub, owns beneficially and of record 52.4% of the outstanding shares of A&P's common stock as of May 1, 1986.

[2] The Statement of the Case is set forth in greater detail in A&P's Petition for Writ of Certiorari at No. 86-203, filed August 11, 1986.

However, the collective bargaining agreement subsequently submitted by the Union to A&P for signature contained several material errors and provisions to which the parties had not agreed. A&P refused to sign it.

A&P and the Union then agreed to submit to arbitration the issue of whether a collective bargaining agreement was in effect. The Arbitrator concluded that "[t]he 1977-1980 Agreement temporarily was extended during negotiations, but terminated on October 23, 1980." The Arbitrator further concluded that there never was a 1980-1983 collective bargaining agreement in effect between A&P and the Union. Specifically, the Arbitrator found that: "the Parties *never* had attained mutual understanding [,] . . . *never* had reached a true agreement" and that "there *never* was a complete meeting of the minds on many essential issues" necessary to the formation of an overall accord. The Arbitrator expressly found that the "MOA [Memorandum of Agreement] was not intended to be a final, complete contract document and both parties anticipated that their 'bargain' would have to be moulded into a more formal and complete instrument."

The Union filed an action to vacate the arbitration award. The District Court entered summary judgment for A&P, and the United States Court of Appeals for the Third Circuit affirmed. *United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co., Inc.*, 734 F.2d 455 (3d Cir. 1984).

The present action arose from the closing of the Altoona Division on September 23, 1982. One of the provisions in the expired 1977-1980 Contract required A&P to make three months of contributions to the Fund on behalf of employees who were laid off during the term of said

Contract. Despite the fact that Altoona Division employees were terminated upon the closing of the division rather than laid off, and that there was no collective bargaining agreement in effect between A&P and the Union at the time, the Fund nevertheless claimed entitlement to contributions for those employees.

The District Court entered summary judgment in favor of A&P and against the Trustees on all counts in the Amended Complaint. On appeal, the Third Circuit affirmed the District Court's entry of summary judgment on the action brought under Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. § 1145. *Moldovan et al. v. The Great Atlantic & Pacific Tea Co., Inc.*, 790 F.2d 894 (3d Cir. 1986). The Third Circuit held that Section 515 of ERISA does not provide a ground for the Trustees' claim in the absence of a valid labor agreement. *Id.* at 901.

SUMMARY OF ARGUMENT

The Trustees' petition for writ of certiorari should be denied. There are no special and important reasons for granting it; the decision of the Third Circuit is consistent with applicable decisions of other Courts of Appeals on the same matter and the Third Circuit's decision conforms with applicable decisions of this Court.

First, the Trustees urge a reading of Section 515 of ERISA which is plainly at odds with the language of the statute. That reading was correctly rejected by the Third Circuit below, and has been rejected in decisions by the Fifth and Ninth Circuits. *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Laborers Health and Welfare Trust Fund for Northern California v. Advanced*

Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985). The only support for the Trustees' position is a California District Court case. The reasoning of that case was found to be "incorrect" and "unconvincing" by the Ninth Circuit when it addressed the same issue in *Advanced Lightweight.*

Second, the position urged by the Trustees is contrary to basic and well settled principles of statutory construction. Section 515 of ERISA mentions only obligations under a plan or under the terms of a collectively bargained agreement. Section 515 omits any mention of an obligation to contribute under any applicable labor-management relations law. In contrast, Section 4212 of ERISA, 29 U.S.C. § 1392, which was added at the same time as Section 515, includes obligations which arise under a labor agreement and ones which arise under applicable labor-management relations law. The omission of language from Section 515 similar to that found in Section 4212 is strong evidence that Congress did not intend to give the district courts jurisdiction to enforce collection of contributions due under applicable labor-management relations law. *See, e.g., Russello v. United States,* 464 U.S. 16 (1983).

Third, the Trustees attempt to create a conflict between Section 515 of ERISA and the doctrine of preemption under the National Labor Relations Act ("NLRA") where none in fact exists. In situations of alleged unfair labor practices arising by reason of an employer's failure to make contributions to a fund after expiration of a collective bargaining agreement, Congress left the National Labor Relations Board with exclusive jurisdiction; there is no support in the plain language of Section 515, in its legislative history or anywhere else for inferring otherwise.

ARGUMENT

I. The Third Circuit Correctly Held That, In The Absence Of An Existing And Enforceable Collective Bargaining Agreement, Allegedly Delinquent Contributions May Not Be Collected Pursuant To Section 515 Of ERISA

Section 515 of ERISA provides a right of action if an employer fails to fulfill obligations imposed either 1) under the terms of the plan or 2) under the terms of a collectively bargained agreement.

Notwithstanding the language of Section 515, the Trustees contend that they are entitled to collect contributions under Section 515 based on A&P's alleged obligation to contribute under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). The duty to bargain in good faith under Section 8(a)(5) of the NLRA prohibits an employer party to a collective bargaining relationship with a union from unilaterally changing the terms and conditions of employment for employees covered by the agreement.[3]

The distinction between a contractual duty to contribute and a statutory duty under the NLRA was clearly understood by Congress. The plain language of Section 515

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[3]Thus, when a collective bargaining agreement expires, an employer may not unilaterally change existing terms or conditions of employment, such as contributions to health and welfare plans, unless the employer's changes are made subsequent to having reached a bargaining impasse with the union over the disputed term or condition of employment and the union has rejected the changes prior to reaching impasse. *Capitol City Lumber Co. v. NLRB*, 721 F.2d 546 (6th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982); *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), *enf'd*, 428 F.2d 133 (8th Cir. 1970).

of ERISA mentions only obligations under a plan or under the terms of a collectively bargained agreement. Significantly, Section 515 omits any mention of an obligation to contribute under any applicable labor-management relations law. This is noteworthy because Section 515 of ERISA was enacted in 1980 as one of many new sections added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Section 4212 of ERISA was added by MPPAA at the same time as Section 515. Section 4212 clearly and unmistakably signals an appreciation of the differences between an obligation which arises under a labor agreement and one which arises under applicable labor-management relations law:

> (a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4212(a), 29 U.S.C. § 1392(a).[4]

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[4]The legislative history of MPPAA confirms that Congress understood the separate and distinct nature of a statutory obligation to contribute under labor-management relations law: "An obligation to contribute to the plan may exist not only under a collective bargaining agreement or other contract but also, in certain circumstances, under applicable labor law or other law." Senate Labor Committee Summary and Analysis of Consideration of S. 1076 (April 1980), *reprinted in* 310 BNA Pension Reporter Special Supplement at 82 (1980) ("Special Supplement").

Section 4212(a) of ERISA is a definitional section only and defines the term "obligation to contribute" as that term is used in Title IV, subtitle E, part 1 of ERISA, 29 U.S.C. §§ 1381-1405. The subject matter of subtitle E is entitled "Special Provisions of Multiemployer Plans"; Part 1 of subtitle E is entitled "Employer Withdrawals."[5]

Bearing in mind that Section 515 was added at the same time as Section 4212 and that both sections were added by MPPAA, the careful wording of Section 515 takes on added significance. If Congress had intended Section 515 to enforce obligations under existing labor-management relations law, such as NLRA Section 8(a)(5), it would have said so as it clearly did in Section 4212(a).[6]

"'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.' *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (CA5 1972)." *Russello v. United States,* 464 U.S. 16, 23 (1983). The fact that Congress did not include the language from Section 4212 in Section 515 establishes that Congress did not intend to supplant the exclusive authority of the National Labor Relations Board for enforcement of alleged violations of Section 8(a)(5) of the NLRA.

The above argument is strongly supported by the fact that, if the definition in Section 4212(a) were not limited to

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[5]Section 4212, by its terms, is inapplicable to the merits of the instant dispute. It deals with the subject of withdrawal liability only.

[6]The legislative history of Section 515 of ERISA confirms this point: "The bill imposes a Federal statutory duty to contribute on employers that are *already contractually obligated* to make contributions to multiemployer plans." Special Supplement at 91 (emphasis added).

issues of withdrawal liability, the effect would be to undermine the very purpose of Section 515. The instant action, like most actions brought under Section 515, is an action to collect delinquent contributions. Applying the definition of "obligation to contribute" in Section 4212 to this case would actually *preclude* recovery under Section 515 of the contributions which the Trustees claim are delinquent and due and owing by A&P. This is so because Section 4212(a) specifically excludes the obligation "to pay delinquent contributions". 29 U.S.C. § 1392(a). Obviously, Congress did not intend such an absurd result. It must, therefore, be concluded that when Congress defined "obligation to contribute" in Section 4212(a) of ERISA, it meant to limit that definition to questions of withdrawal liability.

In support of their contrary position, the Trustees rely on *Laborers Health and Welfare Trust Fund v. Hess,* 594 F. Supp. 273 (N.D. Cal. 1984), where the District Court held, despite the absence of a valid collective bargaining agreement and the clear language of Section 515 of ERISA, that Section 515 conferred jurisdiction on it to adjudicate a multiemployer fund's claim for contributions based upon the definition of "obligation to contribute" appearing in Section 4212 of ERISA.

Hess, however, is at odds with the controlling Ninth Circuit decisions in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.,* 779 F.2d 497 (9th Cir. 1985) and *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984).

In *Advanced Lightweight,* multiemployer trust funds brought an action against an employer under Section 515 of ERISA to recover contributions for the period following the expiration of a collective bargaining agreement. The

District Court entered summary judgment in favor of the employer and the Ninth Circuit affirmed. The Ninth Circuit specifically found *Hess* to be "unconvincing" and "incorrect."

Every other court which has considered the issue has shared the views of the Ninth Circuit in *Advanced Lightweight* and the Third Circuit below, and has declined to engraft the Section 4212 definition onto Section 515. *See U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985).

Accordingly, the Courts of Appeals have correctly concluded that when Congress used the words "under the terms of a collectively bargained agreement" in Section 515, it meant to give them their ordinary and customary meaning, *i.e.* an employer's obligation to contribute is tied to the existence of a collective bargaining agreement whose *terms* require that the employer make contributions to the plan.

The Trustees further have artificially set up a conflict between Section 515 of ERISA and the doctrine of NLRA preemption where none in fact exists.[7] Because jurisdiction under Section 515 depends upon the existence of a valid labor agreement, there would be no basis for a district court to assume jurisdiction pursuant to Section 515 of ERISA of a claim by fund trustees to collect contributions

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[7]The case of *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) has nothing to do with the ERISA Section 515 claim. In *Robbins*, the narrow issue was whether the trustees had to defer to an arbitration clause in a collective bargaining agreement before initiating suit. In the instant case, the issue is whether the Trustees' cause of action even exists.

alleged, as here, to be due by virtue of a statutory duty. Thus, the issue is not one of NLRA preemption, but rather one of whether Section 515 by its language even gives jurisdiction to the federal courts in this case. This is simply a question of statutory construction.[8] The Trustees urge that Section 515 be construed at odds with the face of the statute. "The short answer is that Congress did not write the statute that way." *United States v. Naftalin,* 441 U.S. 768, 773 (1979).

Lastly, the Trustees make much of the fact that procedures and remedies under the NLRA are different from that set forth in ERISA.[9] However, the fact that Congress

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[8]Unlike Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, Congress did not incorporate provisions of the NLRA into Section 515 of ERISA. To the contrary, there is nothing on the face of Section 515 to allow collection of contributions arising by virtue of obligations arising under labor-management relations law, such as Section 8(a)(5) of the NLRA.

[9]As stated by the Ninth Circuit in *Advanced Lightweight,* "[d]enying district court jurisdiction to the trust funds need not prejudice their claims against *Advanced.* There is no bar to the trust funds' filing an unfair labor practice charge against *Advanced.*" 779 F.2d at 503. Moreover, the Trustees purported concern that the performance of their fiduciary obligations will be impaired is unfounded. Resort by the Trustees to the NLRB in situations where they believe a statutory (but not a contractual) obligation to contribute exists would not be a breach of their fiduciary duty. As stated in *Advanced Lightweight,* the "availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries . . . ." *Id.* at n.13.

Further, the Trustees concern that the actuarial soundness of the Fund will be compromised if Section 4212 is not read into Section 515 is meritless. As stated by the court in *Mo-Kan Teamsters:*

> It appears to this Court, however, that to the extent that contributions may be due under § 8(a)(5), and not pursuant to an agreement, the plans are, in a sense, gratuitous beneficiaries of the national policy favoring negotiation. If contributions are ordered paid in an action by the N.L.R.B., the hours worked giving rise to

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did not provide a uniform remedy for the collection of allegedly delinquent contributions is not something that the federal courts can rectify. As stated by the district court in the *Rester Refrigeration* case: "Thus, however desirable it might appear to the judiciary that a single judicial remedy should be provided for all contributions to trust funds allegedly owed by employers, whether the obligation to pay arises from the contract or from a statutory duty, only the Congress can make such a provision." 612 F. Supp. 1033, 1037 (D.C. La. 1985), *aff'd*, 790 F.2d 423. So far Congress has not chosen to do so.

We submit that the Third Circuit was correct in finding that, in the absence of a collective bargaining agreement, Section 515 of ERISA does not provide a basis for recovery by the Trustees in this case.

II. The Trustees' Reliance On *Ottley v. Sheepshead Nursing Home* Is Misplaced. That Case Is Factually And Legally Inapposite To The Issues In This Action And Provides No Basis For Granting The Trustees' Petition

As an alternative basis for granting their Petition, the Trustees rely on *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982), a case both factually and legally inapposite to the instant case. *Ottley* was an action to confirm an arbitrator's award in which the arbitrator found,

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(Continued)

those contributions can be counted toward benefit rights. If no contributions are collected because there was no unfair labor practice or because the General Counsel of the N.L.R.B. determines that prosecution of the case would not effectuate the purposes of the NLRA, then the funds, and ultimately the employees, have lost nothing to which they were entitled under any agreement with the employers.

605 F. Supp. at 1447.

based upon his interpretation of the provisions of Sections 8(d)(1) and 8(d)(4) of the NLRA, 29 U.S.C. § 158(d), that a contract had not been terminated because the employer had failed to give the necessary notice under Section 8(d)(1) to terminate the agreement and, therefore, the underlying dispute was arbitrable.

Ottley is factually inapposite because there has been no evidence that the 1977-1980 Contract between A&P and the Union was extended in its entirety by operation of law pursuant to Section 8(d) of the NLRA. Indeed, the Arbitrator in the instant case found that the 1977-1980 Contract had in fact expired.

Nonetheless, the Trustees now attempt to characterize the instant case as involving "a question of interpretation" and not one of unilaterally changed terms and conditions of employment. The basic and overriding difficulty with the Trustees' assertion that they are not claiming A&P has committed an unfair labor practice lies in the language of the Amended Complaint.[10]

The court below analyzed the claims set forth in the Amended Complaint and properly rejected the Trustees' argument. These claims are that A&P unilaterally determined that the employees in the Altoona Division were terminated, as opposed to laid off, and therefore refused to

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[10]In paragraphs 20-22 thereof, the Trustees allege that A&P observed certain terms and conditions of employment. In paragraph 23, the Trustees allege that "A&P cannot unilaterally change those terms and conditions of employment without bargaining with Local 590 either to agreement or to impasse, which it has not done." In paragraph 24, the Trustees allege that A&P "unilaterally changed the terms and conditions of employment without notifying the employees of the change."

Moreover, in discovery, the Trustees reaffirmed that they base their claim on A&P's alleged unilateral change of the terms and conditions of employment.

make contributions on their behalf. The Trustees are, in reality, alleging that one term or condition of employment or past employment practice which A&P applied to the Union represented employees in its Altoona Division was the right to be placed in layoff status when a store or group of stores was closed. The thrust of that allegation is clearly that A&P made a unilateral change in working conditions. *See The Sacramento Union,* 258 NLRB 1074 (1981). What is really at issue here is whether A&P arguably committed an unfair labor practice and the Court below properly held that the District Court had no jurisdiction to determine whether an unfair labor practice had been committed. *San Diego Building and Construction Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959).

Finally, *Ottley* does not represent the clear majority of the Second Circuit panel. Also, there is no conflict in the Courts of Appeals since *Ottley* has absolutely nothing to do with the issues raised in the instant case or with those raised in the Fifth, Eighth and Ninth Circuit cases cited by the Trustees.

CONCLUSION

For the reasons stated above, the Trustees' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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